

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Physician Hospitals of America and Texas Spine
& Joint Hospital, Ltd.,

Plaintiffs,

v.

Kathleen Sebelius, in her official capacity as
Secretary of the United States Department of
Health and Human Services,

Defendant.

Civil Action No. 6:10-00277-MHS

MOTION FOR LEAVE TO FILE AMICUS BRIEF BY GILBERT HOSPITAL LLC

Gilbert Hospital LLC requests leave of this Court to file an *amicus* brief. Gilbert Hospital is a physician-owned hospital located in Gilbert, Arizona, that specializes in emergency care. Months before the enactment of the Patient Protection and Affordable Care Act (“ACA”), Gilbert Hospital had started the process of expanding its facility. As of March 23, 2010, Gilbert Hospital had spent more than \$4 million in connection with the expansion. Now, as a result of Section 6001 of the ACA, Gilbert Hospital must make a choice from among unfortunately alternatives: abandoning its expansion and losing all benefit of that \$4 million investment; continuing the expansion and giving up its ability to bill Medicare for claims referred by its physician-owners; or buying out its physician-owners.

Gilbert Hospital seeks to file an *amicus* brief in this case in order to present the perspective of physician-owned hospitals that specialize in emergency medicine. The parties in this case have focused on physician-owned hospitals that specialize in orthopedics (like plaintiff Texas Spine and

Joint Hospital), and to a lesser extent cardiac care and surgery. There are important differences between those types of physician-owned hospitals, and hospitals that specialize in providing emergency care. The concerns that might have motivated Congress to restrict the growth of other types of physician-owned hospitals do not apply to emergency-focused hospitals. The proposed *amicus* brief explains these differences.

Gilbert Hospital acknowledges that this Court intends to issue an order that rejects the plaintiffs' challenges to Section 6001 of the ACA. The purpose of Gilbert Hospital's *amicus* brief is not to persuade this Court to reverse course. Instead, Gilbert Hospital's hope is to make this Court aware that the arguments the government has made in this case in defending Section 6001 apply—if at all—to physician-owned hospitals that specialize in orthopedics. The government's claimed rational bases for Section 6001 do not apply to physician-owned hospitals that specialize in emergency care.

Gilbert Hospital's hope is that, in drafting its order, the Court will be cognizant that the analysis could be very different with regard to other types of physician-owned hospitals, and that the Court will limit its ruling to the types of physician-owned hospitals that the parties have discussed in their briefing.

Gilbert Hospital also acknowledges that this Court had established September 9 as the deadline for *amicus curiae* briefs, and asks the Court to make an exception to that deadline for this brief. Gilbert Hospital is obviously not a party to this case, and was not aware of the September 9 deadline until an attorney for the Secretary mentioned it in an email on December 20, 2010. In fact, Gilbert Hospital was not even aware of the existence of this lawsuit until well after that September 9 deadline had already passed. So it was not possible for Gilbert Hospital to comply with the September 9 deadline.

Accepting Gilbert Hospital's amicus brief should not prejudice the parties. Gilbert Hospital is not asking the Court to reconsider its decision to rule against the plaintiffs. Gilbert Hospital might not agree with that decision, but the purpose of its amicus brief is not to take a position on the merits of the dispute. Instead, Gilbert Hospital's brief explains the critical differences between physician-owned hospitals that specialize in emergency care, and other types of physician-owned specialty hospitals, in the hope that the Court will consider those differences when drafting its upcoming opinion.

RESPECTFULLY SUBMITTED this 22nd day of December, 2010.

/s/ Scott M. Bennett

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CERTIFICATE OF CONFERENCE

I hereby certify that Gilbert Hospital LLC has complied with the meet and confer requirements of Local Rule CV-7(h) and (i).

On December 20, 2010, I sent an email to the attorneys for the parties. I explained the general content of Gilbert Hospital's proposed amicus brief, and asked about the parties' positions on Gilbert Hospital's motion for leave to file the brief.

One of the attorneys for Secretary Sebelius responded that the Secretary opposes Gilbert Hospital's motion because it comes after the September 9 deadline for amicus briefs set out in this Court's scheduling order, and because he understood that Gilbert Hospital was a member of Physicians Hospitals of America, one of the plaintiffs in this case. I sent an email in response that explained that Gilbert Hospital was not aware of the September 9 deadline for amicus briefs until the Secretary's attorney mentioned it in that email, and that Gilbert Hospital was not even aware of the existence of this lawsuit until well after that September 9 deadline had already passed. I also explained that Gilbert Hospital is not a member of Physicians Hospitals of America.

The attorneys for the plaintiffs also responded, and explained that they would check with their clients' as to their position on the motion. As of the time of this filing, I had not received word from the plaintiffs' attorneys about the plaintiffs' position. As soon as I do, I will file a supplement to this certificate that relays the plaintiffs' position to the Court.

RESPECTFULLY SUBMITTED this 22nd day of December, 2010.

/s/ Scott M. Bennett

Scott M. Bennett (admitted *pro hac vice*)

Attorney for Amicus Curiae Gilbert Hospital LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2010, I caused a true and correct copy of the foregoing document to be filed and served upon counsel of record electronically by means of the Court's CM/ECF system.

/s/ Sheri McAlister
